

WHAT HAPPENS WHEN THE DISADVANTAGE REMAINS?

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This talk covers:

- What happens after reasonable adjustments have been made.
- What happens if there is some improvement?
- What happens if there is none?
- What are the options for employer and employee?
- How feasible is a subsequent capability dismissal?

ADJUSTMENTS – INITIAL THOUGHTS

- The test of reasonableness is objective
Smith v Churchills Stairlifts plc
- A holistic approach **Burke v The College of Law**
- S.20 duty is to make adjustments that keep a disabled person in employment, not to allow them to leave employment on favourable terms.

WILL IT BE EFFECTIVE?

“So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness”.

Griffiths v SoS for Work and Pensions

Effectiveness

- Was there a measure of effectiveness, agreed or otherwise?
- Was there a timescale – agreed or otherwise?
- Who is making the assessment of effectiveness?

Example - 1

Maria suffers from a degenerative condition affecting her spine. After a workplace assessment carried out by a specialist company, she is provided with a specially adapted chair to allow her to work at her desk for a full day with only the usual breaks. After just two weeks, she says the chair isn't working and her back pain is preventing her from sitting for longer than fifteen minutes without having a break.

EXAMPLE - 2

Maria says that, on reflection, it is a bit better with the adapted chair, and she thinks that the chair together with a 10 minute break every hour would mean that she could work for a full day – or perhaps half a day.

EXAMPLE - 3

Joe suffers from depression and has been off work for 6 months. As an adjustment, a phased return to work is agreed: 1st month 1 day pw; 2nd month 2 days pw etc. In the middle of the second month he is signed off sick by his GP for 2 months as unfit to work. Joe wants to re-start the phased return.

DISMISSAL

Where an employer is considering the dismissal of a disabled worker for a reason relating to that worker's capability or their conduct, they must consider whether any reasonable adjustments need to be made to the performance management or dismissal process which would help improve the performance of the worker or whether they could transfer the worker to a suitable alternative role.

EHRC Code 19.9

EXAMPLE - 4

Joe's employer decides that it would be unreasonable to wait until Joe is able to return to work, whenever that might be, and re-start a process that didn't work. They invite Joe to a capability hearing, but he says he's too ill to attend. They then proceed in his absence and he is dismissed.

DISMISSALS

- An employer should show that it considered adjustments in the dismissal process – and not just to make the exit easier but to continue to try and avoid the exit.
- The fact that adjustments have failed does not release the employer from making sure it is a fair capability dismissal. Therefore, consideration of alternatives

DISCRIMINATION

- Dismissal of a disabled employee where adjustments have been made always risks claim under EqA.
- S.15 and justification

EXAMPLE - 5

Maria's employer does not agree to Maria having a 10 minute break every hour, because the nature of her work requires her to be online for continuous periods and this would be unmanageable. Maria develops work-related stress and is absent for 2 months. When called to a capability hearing, she resigns and claims constructive unfair dismissal.

Thank you

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